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No. 85-1129

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PAUL E. JOHNSON,
Petitioner,
v.
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,
Respondents.

On A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of the Respondents. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 93 national and international unions representing over 13,000,000 working men and women. The AFL-CIO's policy position on affirmative action plans, declared most recently by its Sixteenth Constitutional Convention, is that such plans are "necessary . . . to ensure that minorities and women

take their rightful places in our economic system and to achieve equality and harmony among the races."

2. The sole issue in this case is whether Respondent Santa Clara County violated Title VII of the Civil Rights Act of 1964, 42 N.S.C. § 2000e *et seq.*, by adopting and implementing a voluntary affirmative action plan. This Court has addressed a like question on only one occasion, in *Steelworkers v. Weber*, 443 U.S. 193 (1979). The AFL-CIO filed a joint brief in *Weber* with the United Steelworkers of America defending the lawfulness of the affirmative action plan that was at issue in that case.

3. The AFL-CIO has a somewhat different understanding of *Weber* than do the parties to this case. As explained in the attached brief, we believe that *Weber* teaches that an employer may engage in affirmative action without violating Title VII so long as the employer is acting to redress a historic imbalance in the employer's workforce, and without regard to the proof of the causes or possible causes of that imbalance. We seek to file the attached brief in order to present to the Court the basis for that reading of Title VII and of *Weber*.

4. Petitioner and the Respondents have consented orally to the filing of the attached brief. The timing of the filing, however, necessitates this motion, as explained below.

(a) This brief is being submitted within the deadline for the filing of the brief of the Respondent Service Employees International Union, Local 715 ("SEIU Local 715"), and four days after the deadline for the filing of the brief of the Respondent Transportation Agency, Santa Clara County, California (the "County"). The Clerk's office has informed us that because the deadline for the brief of *one* of the Respondents has passed and because the deadline of the other Respondent was extended only because that Respondent, through a misunderstanding, was not originally served with a copy of the brief for the United States, the filing of an *amicus*

curiae brief after the first deadline would not be considered timely under Rule 36.2, even though the brief is being filed "within the time allowed for the filing of the brief of [one of] the part[ies] supported."

(b) In deference to the Court, it is the AFL-CIO practice, in cases like the instant one in which a union affiliated with the AFL-CIO is a party, to consult closely with the affiliate with respect to the case, and to file a separate *amicus curiae* brief only if we find that we have something to add to what is contained in the union-party's brief. Given our practice of close consultation with counsel for the union-party in a case, we were, of course, put at the same disadvantage in completing our brief in this proceeding as SEIU Local 715. Until that Union determined its position, we could not determine whether or not it would be appropriate to prepare and file an AFL-CIO *amicus curiae* brief.

(c) It is our understanding that oral argument in this case will not be heard until November or December, 1986. Permitting the filing of this *amicus curiae* brief thus will not prejudice any of the parties to this case nor delay the Court's consideration of the matter. And because of the different approach we take, our presentation may be of assistance to the Court in considering the vital issue raised here.

WHEREFORE, the AFL-CIO requests that leave be granted to file the attached brief *amicus curiae*.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file the brief. The interest of the *amicus curiae* is stated in the motion.

SUMMARY OF ARGUMENT

Two fundamental questions are posed in this case: first, has a sufficient predicate been shown to enable Respondent Santa Clara County (the "County") to engage in some form of affirmative action without violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; and, if so, second, whether the particular means the County has adopted toward that end are consistent with Title VII.

In Part I we show that under *Steelworkers v. Weber*, 443 U.S. 193 (1978)—which, we demonstrate, is the controlling authority here—an employer may engage in at least some forms of affirmative action to redress a long-standing and conspicuous imbalance in the employer's workforce, without regard to the causes or possible causes of that imbalance. We further show that *Weber* squarely refutes the argument of Petitioner and the Solicitor General that a "history of past discrimination in which the employer has participated," Br. for the U.S. at 10, is a necessary prerequisite to lawful affirmative action under Title VII. And *Weber* equally clearly rejects Santa Clara County's theory that proof of an arguable violation of Title VII is a necessary prerequisite.

In Part II we show that the means chosen by the County to implement its affirmative action plan are lawful under Title VII. The County's affirmative action plan does not "unnecessarily trammel the interests of [nonminority] employees." *Weber*, 443 U.S. at 208. As in *Weber*, the County's plan "does not require the discharge

[or layoff] of [nonminority] workers," and does not "create an absolute bar to the advancement of white employees." *Id.* Indeed, the instant case is a far easier one than *Weber* in this regard for two reasons: first, the County uses gender only as a "plus" factor in making employment decisions and does not bar nonminorities from competing for any available opening; and second, the County's affirmative action plan does not disrupt any settled employment expectations.

The County's affirmative action plan likewise satisfies *Weber*'s requirement that affirmative action may be pursued only as a "temporary measure." 443 U.S. at 208. The County's plan is temporary in precisely the same way as was the plan at issue in *Weber*: neither contains an express terminal date but each is impliedly limited to achieving—and not maintaining—racial/gender balance. Any doubt on this score should be resolved (as it was in *Weber*) by construing the plan to render it lawful rather than unlawful.

ARGUMENT

I. THE ENDS OF THE AFFIRMATIVE ACTION PLAN

A review of the developing jurisprudence on the legality of affirmative action plans indicates that in a case challenging such a plan, it facilitates analysis to ask first whether a sufficient predicate has been shown to justify some form of affirmative action and, if so, to inquire second whether the particular form of affirmative action at issue is lawful. We therefore proceed in that manner treating with the first question in this Part of the Argument and the second question in Part II *infra*.

Petitioner's complaint in this case pleads a claim under only Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, J.A. 7, and, thus, as Petitioner states in his brief, "Petitioner only seeks relief under Title VII," Pet. Br. at 19. Accordingly, the threshold question here is when an employer (and a union) may, without running afoul of that statute, engage in voluntary affirmative action.

This Court has addressed that issue on only one occasion, in *Steelworkers v. Weber*, 443 U.S. 193 (1979), a case involving a *private* employer. In seeking the issuance of a writ of certiorari in this case, Petitioner —like the lower courts—treated *Weber* as the controlling precedent. *See* Pet. for Cert. at 9-10 (*Weber* "set forth the standard for voluntary affirmative action plans"). But in his brief on the merits, Petitioner—supported by the Solicitor General—argues that different "constraints may apply to a *public* employer's voluntary affirmative action plan under Title VII." Pet. Br. at 20 (emphasis added). In particular, Petitioner argues that "the strict scrutiny standard [of the Equal Protection Clause] must also be applied under Title VII to sex-based discrimination by a public employer under a voluntary affirmative action [plan]." *Id.* at 23. As we proceed to show, Petitioner is mistaken.

A.(1) Title VII contains a unitary set of prohibitions, set forth in § 703 of that Act, 42 U.S.C. § 2000e-2, which applies to all "employers," as that term is defined in § 701(b), 42 U.S.C. § 2000e-(b). At the time those prohibitions were enacted in 1964, public employers were expressly excluded from the definition of "employer." The prohibitions stated in § 703 thus were "enacted pursuant to the commerce power to regulate purely private decisionmaking [*and*] *w*[*ere*] *not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.*" *Weber*, 443 U.S. at 206 n.6 (emphasis added).

The exclusion of public employers from Title VII's coverage was repealed in the Equal Employment Opportunity Act of 1972, P.L. 92-261, but Congress did not at that time amend § 703 in any respect. It would be surprising, indeed, if the 1972 Congress' purpose in amending the *definitional* provision of Title VII was to create, *sub silentio*, new and unique substantive rules to govern the duties of the public employers thereby brought under the Act. And as this Court has concluded, Congress had no such hidden agenda; the legislative materials show

that "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977). *See also Firefighters v. Cleveland*, —— U.S. ——, 54 L.W. 5005, 5010 n.10 (July 2, 1986).[1]

(2) The Solicitor General argues that any "constitutional limitations" on affirmative action by public employers must be read into § 703 to "avoid[] an interpretation of Title VII which would render it *pro tanto* unconstitutional" and would "'authorize' unconstitutional behavior." Br. for the U.S. at 6, 10 n.5. Those constitutional limitations, as *Weber* makes clear, do not apply to private employers who voluntarily adopt, or agree in collective bargaining, to affirmative action plans since such actions are not "state action." *See* 443 U.S. at 200.

The Solicitor General's argument is wrong because this case concerns the reach of § 703, and that section "can hardly be said to 'authorize' anything at all: it is purely prohibitory." *County of Washington v. Gunther*, 452 U.S. 161, 169 (1981). Thus, a holding that § 703 does not *condemn* all affirmative action that the Constitution proscribes would not "render Title VII *pro tanto* unconstitutional," any more than the 1964 Act was ren-

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[1] In reporting the bill that became the 1972 Act, the Senate Committee on Labor and Public Welfare stated: "The Committee believes that the employees of State and local governments are entitled *to the same benefits and protections* in employment as the employees in the private sector of the economy." S. Rep. 92-415, 92nd Cong., 1st Sess. 9 (1971) (emphasis added), *reprinted in Legislative History of the Equal Employment Opportunity Act of 1972*) ("Leg. Hist."). Senator Williams, the chief sponsor of the bill, repeated this explanation during the Senate debates. *See Leg. Hist.* at 1113.

The Senate amended the Labor Committee's bill in other respects but accepted that Committee's proposal to extend the Act to public employers. *See Leg. Hist.* 1102-76, 1789-90. The bill adopted by the House contained no comparable provision. *See id.* 326-32. In Conference the House receded. *See id.* 1813 (joint explanatory statement of the Conference Managers.)

dered unconstitutional because that Act did not proscribe any act of public-sector discrimination. Rather, such a holding would mean simply that in enacting Title VII, Congress did not create an additional statutory remedy for all of the conduct that is remediable under the Constitution (and under 42 U.S.C. § 1983).

Because that is so, Petitioner's and the Solicitor General's reliance on *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), *see* Br. for Pet. at 21; Br. for the U.S. at 10 n.5, is misplaced. *Catholic Bishop* wisely counsels that "there must be present the affirmative intent of Congress clearly expressed," before the Court will conclude that Congress intended to enact a law that "would give rise to serious constitutional questions." 440 U.S. at 501. That sound rule of construction—and of judicial restraint—simply has no application here as no constitutional question is implicated by the determination of the extent of the Title VII cause of action against affirmative action plans.[2]

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[2] Of course, if the Solicitor General were correct—if "any constitutional limitations on [affirmative action] carry over to Title VII," Br. for U.S. at 6—it would then be necessary to determine the circumstances under which gender-conscious, as distinguished from race-conscious, affirmative action is permitted.

This Court has not yet confronted that question. And it is not at all clear that the limitations on affirmative action that the Court has developed with respect to race-conscious measures—limitations that reflect at least a plurality's view that any form of racial classification must satisfy the "compelling interest" standard, *see Wygant v. Jackson Board of Education*, —— U.S. ——, 54 L.W. 4479, 4481 (May 19, 1986) (plurality opinion); *id.* at 4484 (O'Connor, J., concurring); *see also id.* at 4487 (White, J., concurring)—are equally applicable to the gender area, in which the Court has not heretofore applied a compelling interest test, *see, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). *See also University of California Regents v. Bakke*, 438 U.S. 265, 302-03 (Powell, J.) ("Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria").

The Solicitor General argues that "the strictest level of scrutiny" is applicable here because "Congress decided in Title VII to extend the same protection from discrimination based on race to discrimi-

In sum, there is no basis for interpreting Title VII to impose different prohibitions on public employers than on private employers. Nor is there any basis for concluding that Title VII's unitary set of prohibitions necessarily go as far as the Fourteenth Amendment's prohibitions. Thus, Petitioner's original position in this case is the correct one: *Weber* "set[s] forth the standard for voluntary affirmative action" that is controlling here. We therefore turn to a review of the *Weber* decision.

In so doing, we find ourselves in disagreement not only with the Petitioner and the Solicitor General, but with the Respondent Santa Clara County as well. Petitioner seemingly understands *Weber* to hold that affirmative action is lawful under Title VII only if designed to remedy "past discrimination" by the employer. Pet. Br. at 43. The Solicitor General views *Weber* as "pointing in two directions" and relies on other cases—none of which involves voluntary affirmative action under Title VII—to "resolve this ambiguity" in favor of the interpretation pressed by Petitioner. Br. for U.S. at 13. And Respondent Santa Clara County also finds *Weber* indeterminate as to "the showing required by an employer to justify affirmative action," Br. for Resp. Santa Clara at 13, and the County also turns to other cases, principally *Wygant*, *supra*, for guidance.

In our view, however, it could not be clearer that, as a matter of statutory interpretation, *Weber* states a set of rules that grants employers a wider leeway in framing and applying affirmative action plans than the rules

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nation based on sex." Br. for U.S. at 10 n.5. Thus the premise of the Solicitor General's attempt to read constitutional limitations into Title VII is that Congress' will must be bent in order to avoid supposed constitutional difficulties. And given that justification, there surely is no basis for extending the prohibitions of Title VII beyond the point where those prohibitions otherwise would reach unless the Constitution so requires.

Thus, if the theory of statutory construction that the Solicitor General urges here were accepted, there would be no avoiding the separate and unsettled constitutional issue posed by gender-based affirmative action.

the Court developed in *Wygant* for assessing the constitutionality of race-based affirmative action plans. To demonstrate that point requires a detailed discussion of both the facts and the reasoning of *Weber*.

B. *Weber* involved an affirmative action plan that was established by virtue of a national collective bargaining agreement between Kaiser Aluminum & Chemical Corp. ("Kaiser") and the United Steelworkers of America covering Kaiser's fifteen plants that were organized by that Union. Under that collective agreement, it was the goal at each plant to achieve "minority" representation (as that word is defined by the EEOC) in craft jobs equal to the percentage of minorities in the labor pool from which the plant hired its employees. To achieve that goal, the agreement obligated Kaiser to create an apprenticeship program to train its production workers to become craftsmen, and to fill those apprenticeships on a seniority basis with the proviso that "not less than one minority employee will enter [the apprenticeship program] for every non-minority employee entering until the goal is reached." *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 222 (5th Cir. 1977) (quoting collective agreement).

The *Weber* case arose out of the implementation of this national agreement at Kaiser's Gramercy, Louisiana plant. Prior to implementation, craft vacancies at Gramercy had been filled by hiring already-trained craftsmen (with five years' experience in an industrial setting) off the street; the record in *Weber* indicated that Kaiser had followed that hiring policy because training a production worker to become a skilled craftsman would have cost approximately $15,000 to $20,000 per trainee. Joint Appendix in No. 78-432 at 67-68. "Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 of 273) of the skilled craftworkers at the Gramercy plant were black, even though the workforce in the Gramercy area was approximately 39% black." *Weber*, 443 U.S. at 198.

When Kaiser implemented the national agreement at the Gramercy plant, the necessary consequence was that some more senior nonminority applicants for the apprenticeship program were denied entry in favor of less senior minority applicants. Brian Weber, an unsuccessful white male applicant, brought suit alleging that the affirmative action plan constituted discrimination on the basis of race in violation of Title VII. Weber prevailed in the lower courts but not in this Court.

In finding a Title VII violation the Fifth Circuit reasoned that the fact that Kaiser employed four black craft workers "reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser," and that, "in the absence of prior discrimination" by Kaiser, its voluntary affirmative action plan was unlawful. 563 F.2d at 224 & n.13. The Court of Appeals rejected Kaiser's claim that the Company was permitted "to correct a lack of training blamed on past *societal discrimination*," stating "[i]t is appropriate to draw the line for application of restorative justice at the Gramercy plant, rather than at a larger universe of . . . society at large." *Id.* at 225-26 (emphasis in original).

This Court stated the resulting "question for decision" as follows: "whether Congress in Title VII . . . left employers and unions . . . free to eliminate manifest racial imbalance in traditionally segregated job categories." 443 U.S. at 197. And the Court concluded for two principal reasons that "Title VII does not prohibit such race-conscious affirmative action plans." *Id.*

The Court first determined that interpreting Title VII to preclude affirmative action in such circumstances "would bring about an end completely at variance with the purpose of the statute.' " *Id.* at 202. The point of the Act, the Court explained, was to address " 'the plight of the Negro in our economy,' " and to facilitate "the integration of blacks into the mainstream of American society" by "open[ing] employment opportunities for Ne-

groes in occupations which have been traditionally closed to them." *Id.* at 202-203, quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). The Court concluded that given those aims

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy. [*Id.* at 204.]

The Court buttressed this conclusion with a second line of reasoning. One of the principles that animates Title VII, said the Court, is that " 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.' " *Id.* at 206, *quoting* H.R. Rep. No. 914, 88th Cong., 1st Sess., pt.2, p.29 (1963). Indeed, it was necessary for the authors of Title VII to adhere to that principle in order to attract the support of traditional conservatives, whose "support was crucial" to overcome the filibuster by Southern Democrats and to secure "passage of the bill." *Firefighters*, *supra*, 54 L.W. at 5010. Thus,

> [t]he conclusion in *Weber* that "Congress chose not to forbid all voluntary race-conscious affirmative action" when it enacted Title VII was largely based upon the legislative history which shows that Congress was particularly concerned to avoid undue federal interference with managerial discretion. . . . As one commentator points out, rather than seeking to outlaw voluntary affirmative action, the more conservative proponents of Title VII who held the balance of power, "were far more concerned to avoid the intrusion into business autonomy that a rigid color-blind standard would entail." [*Id.*] [3]

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[3] In this regard, the *Weber* Court attached considerable significance to the wording of § 703(j) which provides that nothing in Title VII "shall be interpreted to *require* any employer . . . to

The *Weber* Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans" under Title VII, as the Court concluded that the Kaiser plan unmistakably "falls on the permissible side of the line." 443 U.S. at 208. In this regard, the Court noted:

> The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." [*Id.*] [4]

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grant preferential treatment . . . to any group . . . on account of an imbalance which may exist" in the employer's workforce, 42 U.S.C. § 2000e-2(j). *Weber* notes that opponents of Title VII had attacked the legislation on the ground that the bill would require *or would permit* actions to redress imbalance, yet "Congress added § 703(j) which addresses only the first objection." 443 U.S. at 205. The Court also emphasized Representative MacGregor's remarks shortly before the final vote on Title VII:

> Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover . . . People complain about racial "balancing" in the public schools . . . about preferential treatment or quotas in employment. When we drafted this bill we excluded these issues largely because the problems raised by these issues are more properly handled at a governmental level closer to the American people and by communities and individuals themselves. [443 U.S. at 207-08 n.7 quoting 110 Cong. Rec. 15893 (1964).]

Representative MacGregor was not the only legislator to analogize the quota issue to the racial balancing in schools issue, *see, e.g.*, 110 Cong. Rec. 7789 (Sen. Scott), 9881 (Sen. Allott), 10009 (Sen. Bayh), 14313-14 (Sen. Miller); an issue on which Congress indisputably chose not to legislate, *see, e.g., id.* at 1518 (Rep. Celler), 5266 (Sen. Keating), 6820 (Sen. Douglas), 6841 (Sen. Cooper). Nor is the MacGregor statement the only one affirming that the quota issue fell outside the ambit of the bill. *See, e.g., id.* 6565-66 (statement of House Republican sponsors) (Title VII does not "require, reward or encourage the imposition of racial quotas or preferences" and "does not permit the ordering of racial quotas.").

[4] The Court also noted that the Kaiser plan "does not unnecessarily trammel the interests of the white employees" and "is a

And the Court in *Weber* stated its ultimate conclusion as follows:

> We conclude, therefore, that the adoption of the Kaiser- [Steelworkers] plan for the Gramercy plant falls within the area of discretion left by Title VII . . . to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories. [*Id.* at 209]

In two final footnotes, the Court made reference to the argument advanced by Kaiser and by the United States that the "plan was justified because [Kaiser] feared that black employees would bring suit if [Kaiser] did not adopt an affirmative action plan." *Id.* at 209, n. 9. The Court stated that its opinion should "not [be read] to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII." *Id.* at 208, n. 8. Rather, the Court reserved decision on whether such "fear of liability" would provide a narrower alternative justification for engaging in affirmative action. *See id.* at 209, n.9.

In a concurring opinion, Justice Blackmun underscored the Court's refusal to adopt the "fear of liability" theory. Justice Blackmun stated that his "preference would be to resolve this litigation by applying" the "'arguable violation' theory" under which "employers and unions who had committed 'arguable violations' of Title VII [w]ould be free to make reasonable responses without fear of liability." 443 U.S. at 211 (Blackmun, J., concurring). Justice Blackmun noted that "[t]he Court . . . declines to consider the narrow 'arguable violation' approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is 'traditionally segregated'" because of "a societal history of purposeful exclusion of blacks from the job category."

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temporary measure." 443 U.S. at 208. We address the significance of these observations for this case in Part II, *infra*.

Id. at 212 (Blackmun, J., concurring). The Court's interpretation of the statute, Justice Blackmun observed, "sweep[s] far more broadly than the class of arguable violations" in several respects:

> For example, Title VII provides no remedy for pre-Act discrimination, yet the purposeful discrimination that creates a "traditionally segregated job category" may have entirely predated the Act. More subtly, in assessing a *prima facie* case of Title VII liability, the composition of the employer's work force is compared to the composition of the pool of workers who meet valid job qualifications. When a 'job category' is traditionally segregated, however, that pool will reflect the effects of segregation, and the Court's approach goes further and permits a comparison with the composition of the labor force as a whole . . . [*Id.* at 212-13.]

Justice Blackmun ultimately joined the Court, reasoning that "where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief." *Id.* at 214.

C. *Weber* teaches two basic lessons as to the circumstances in which Title VII permits some form of affirmative action.

(1) The first and clearest lesson is a negative one: Title VII does *not* limit affirmative action to situations where there is "a history of past discrimination in which the employer has participated," Br. for the U.S. at 15, *see also* Pet. Br. at 43, or "evidence that would constitute a *prima facie* showing of a Title VII violation," Resp. Santa Clara County Br. at 18.

(a) To begin with, the Court's reasoning in *Weber* does not turn on "a history of past discrimination" by the defendant employer. Consistent with the view, expressed by many Members of this Court, that, "[i]n order to get beyond racism we must first take account of race." [5] the *Weber* Court concluded, in essence, that a

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[5] *Bakke*, 438 U.S. at 407 (opinion of Blackmun, J.); *see also, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concur-

program to train blacks to become craftsmen—training which blacks were denied for so long—furthers the aims of Title VII and is lawful without regard to whether the particular employer who now provides the training was responsible for that past denial. Indeed, the premise of *Weber*—and the precise area of disagreement between this Court and the Fifth Circuit, *see* pp. 7-12, *supra*—is that the defendants in that case were *not* responsible for the past exclusion of blacks from the crafts, yet still were free to adopt their affirmative action program to ameliorate the continuing effect of that exclusion.

That premise reflects the record in *Weber*. As the Court of Appeals there noted, "[t]he district court found and appellants [Kaiser and the Steelworkers] all but concede[] that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant." 563 F.2d at 224.[6] And as that court also observed, the paucity of black craftsmen in the Gramercy area, and the resulting small percentage of black craftsmen in the Kaiser plant, "reflects the general lack of skills among available blacks but does not reflect any unlawful practices by Kaiser." *Id.* at 224 n. 13. Given these findings, and given this Court's reasoning in *Weber*, that decision cannot be read to require proof of past discrimination before an employer may embark on voluntary affirmative action.[6]

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ring) ("In our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination"); *Wygant*, 54 L.W. at 4494 (Stevens, J., dissenting).

[6] To be sure, "the rule governing relief ordered by a court in a Title VII action" is that affirmative action is permitted only "to correct prior discrimination by the employer." Br. for U.S. at 15. But a court cannot order relief of *any* kind in a Title VII action absent a finding of a violation of the Act; this general rule of remediation is expressly codified in § 706(g), 42 U.S.C. § 2000e-5(g) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . .) Thus, if the limitations on the courts were imposed on voluntary action as well,

(b) Nor can *Weber* fairly be read to hold that proof of an *arguable* Title VII violation is necessary to enable an affirmative action plan to avoid condemnation under Title VII as Respondent Santa Clara County seems to believe. While Justice Blackmun, in his concurring opinion in *Weber*, expressed a willingness to adopt that theory, the Court in *Weber* declined to do so. P. 11-12, *supra*. The Court instead sustained the Kaiser plan because that plan furthered the aims of the statute by opening opportunities previously closed to women and minorities, and not because the plan was a method of safeguarding against potential Title VII liabilities.[7]

Furthermore, in *Weber*, any showing of an "arguable" or *prima facie* Title VII violation required proof of a significant disproportion between the percentage of black craftsmen in the Gramercy area and the percentage of black craftsmen employed by Kaiser. As this Court has explained, where "special qualifications are required to fill particular jobs," statistical evidence, to be probative, must be limited to "individuals who possess the necessary qualifications." *Hazelwood School District v.*

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no such action would be permitted absent antecedent *findings of wrongdoing*. Not even the Solicitor General is prepared to go that far.

For this and other reasons, an essential point of *Weber* and of last Term's decision in *Firefighters* is to underscore the difference, for Title VII purposes, between compelled and voluntary affirmative action. As the Court concluded in *Firefighters*:

> [W]hatever the extent of the limits § 706(g) places on the power of the federal courts to compel employers and unions to take certain actions that the employers or unions oppose and would not otherwise take, § 706(g) does not restrict the ability of employers or unions to enter into voluntary agreements providing for race-conscious remedial action. [54 L.W. at 5010.]

[7] Indeed an employer's voluntary affirmative action plan is most unlikely to "resol[ve] charges of discrimination," Br. for the U.S. at 22, unless the program fortuitously reaches *all of the actual* victims of the employer's discrimination, and unless the employer also provides make-whole relief to those victims.

United States, 433 U.S. 299, 308 n.13 (1977). Yet no such evidence was offered in *Weber*; indeed, as noted, it was all but conceded that there were as few black craftsmen in the Gramercy area as in the Kaiser plant. Thus, the record in *Weber* plainly did not contain "a strong basis in evidence" for believing that Kaiser was guilty of past discrimination, *Wygant*, 54 L.W. at 4482 (plurality opinion).

(c) We recognize, of course, that in light of the lessons we contend are compelled by *Weber*, there will be circumstances, at least with respect to race-conscious affirmative action, *see* n. 2, *supra*, in which Title VII will not proscribe conduct which the Fourteenth Amendment (as interpreted in *Wygant*) would condemn if engaged in by a state actor. There is nothing anomalous or unsettling about that conclusion.

In *Wygant*—as we understand the opinions in that case—the Court determined "that a governmental agency's interest in remedying 'societal' discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny." 54 L.W. at 4485 (O'Connor, J., concurring); *see id.* at 4481 (plurality opinion); see also *id.* at 4487 (White, J., concurring). But the question whether an affirmative action plan is supported by a "compelling interest" simply is not relevant in determining whether that plan violates Title VII; in the latter situation, the sole question for decision is how far Congress intended the Act to reach. And what *Weber* teaches is that in enacting rules initially designed to govern only private employers and later extended to apply to public employers as well, Congress was concerned with limiting the degree of federal intrusion into managerial decisions and did not go so far as to outlaw every affirmative action program which, if engaged in by a public employer on a race-conscious basis, would fail the "compelling interest" test.[8]

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[8] Of course, the Court has not yet determined whether redressing societal discrimination is a sufficiently important governmental inter-

(2) There remains the task of identifying what is required by way of justification for an affirmative action plan to meet Title VII's requirements. As to this question, *Weber* again is instructive.

In framing the "question for decision" in *Weber*, the Court placed a limit on the scope of its inquiry by asking whether employers are "free to eliminate *manifest racial imbalance in traditionally segregated job categories.*" 443 U.S. at 197 (emphasis added). Similarly, in explaining why the Kaiser plan "falls on the permissible side of the line," the Court stressed that the plan was "designed to break down *old patterns of racial segregation and hierarchy.*" *Id.* at 208 (emphasis added). And in the final sentence of its opinion, the Court stated its "conclu[sion] as follows: the Kaiser plan "falls within the discretion left by Title VII to adopt affirmative action plans *designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.*" *Id.* at 209 (emphasis added).

Plainly, then, *Weber* provides only that under Title VII, affirmative action to redress "conspicuous imbalance" that has "traditionally" existed is lawful. Title VII, the Court was at pains to add, does "not allow establishment of systems 'to *maintain* racial balance in employment.'" 443 U.S. at 207, n. 7 (emphasis added by Court). *See also Sheet Metal Workers*, 54 L.W. at 4999 (plurality opinion); *id.* at 5001 (Powell, J., concurring); *id.* at 5004 (O'Connor, J., dissenting). Thus, affirmative action violates Title VII if designed merely to restore a previously-achieved balance, to correct a short-term

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est to satisfy the lesser burden of justification generally required for gender-based classifications. *See* n.2, *supra*. Thus, it may well be that the Constitution permits gender-based affirmative action to remedy societal discrimination and that a decision in this case that Title VII permits such affirmative action will be determinative of whether the plan at issue here is lawful. In any event, the decision here is important in that further elaboration of *Weber* will apply to *private* employers as well who are not subject to constitutional constraints. *See* 443 U.S. at 200.

imbalance, and *a fortiori*, where there is no imbalance to redress.[9]

What is less clear from *Weber* is whether proof of a "conspicuous" and "traditional" racial imbalance establishes a sufficient predicate to sustain some form of affirmative action under Title VII, or whether an additional showing is required. In *Weber* the Court traced the imbalance in Kaiser's craft workforce to what the Court viewed as the purposeful discriminatory exclusion of blacks from the crafts; the Court stated that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." 443 U.S. at 198 n.1. Thus *Weber* could be read to limit the freedom to engage in affirmative action to instances in which the imbalance to be remedied is not only traditional but also attributable to identifiable actors who have committed identifiable acts of discrimination.

Although the matter is not entirely free from doubt, we submit that *Weber* should not be read to be so limited. The theory of that decision is that Congress left an "area of discretion" for voluntary affirmative action which is "designed to break down old patterns of racial segregation and hierarchy" and which therefore "mirrors[s]" the purposes of Title VII. It is not necessary that the particular culprits responsible for the "old pattern" be identified before a plan that seeks to address that pattern can be said to advance the statutory goals and thus fall within that "area of discretion." To the contrary, a plan that furthers "the integration of blacks [or women] into the mainstream of American society" by redressing an "old pattern" of imbalance furthers the

[9] The term "imbalance" must be understood in light of the facts of *Weber*. Kaiser's workforce was "imbalanced" in the sense that in an area of the country which was almost 40% black, Kaiser employed few black craftsmen. But as previously noted, Kaiser's craft workforce was *not* necessarily imbalanced in comparison to the craft workforce in the Gramercy area. *Weber* thus does not require imbalance in the latter sense as a precondition for affirmative action.

purposes of the Act, whether or not the causes of the present situation can be neatly identified.

Moreover, requiring that the past wrongdoers be identified as a prerequisite to validating affirmative action under Title VII runs contrary to other important principles that lie at the heart of the Act. Title VII imposes responsibility for employment discrimination as of the effective date of the Act or, as of the start of the limitations period in a particular case, whichever is later. A discriminatory act predating that date is "merely an unfortunate event in history which has no present legal consequences." *Evans v. United Air Lines*, 431 U.S. 553, 558 (1977). Thus, judges and lawyers are not required by Title VII to delve into the past and attempt to allocate responsibility for "ignominous page[s] in this country's history," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); such questions (which in any event are not easy to resolve through the litigation process) remain the province of historians and sociologists, and not jurists. Yet if *Weber* were read to require proof of past discrimination by an identifiable actor before affirmative action is deemed lawful, an employer wishing to eliminate a long-standing imbalance in its workforce would first have to trace the cause of that "traditional" imbalance back to its origins and, if the employer's affirmative action plan were challenged, the employer then would have to prove to the satisfaction of the court the historic guilt of some third party or parties.

In sum, *Weber* is best read to hold that at least some forms of affirmative action aimed at redressing a conspicuous and long-standing exclusion of blacks or women from a particular job category are lawful under Title VII.

D. Measured against this test, there is no doubt that a sufficient predicate has been established in the instant case to permit some form of affirmative action by Respondents Santa Clara County and the Union. The record shows that as of 1973, when the County's Transporta-

tion Agency first developed an affirmative action plan, *see* J.A. 37, only 8% of the Agency's employees were female, *id.* 45, far short of the representation of women in the area workforce (36.4%), *id.* Using categories developed by the EEOC for grouping jobs, *id.* 47, 49, 125-26, the Agency did a workforce analysis which showed that as of 1978 no women had yet succeeded in securing a "skilled craft" job, and few women had secured technical or professional jobs, J.A. 49. Accordingly, the Agency's affirmative action plan, to which the Union agreed, *see* Br. of Resp. SEIU Local 715 at 27-28, provided that:

> [A] priority objective of the Agency EEO Affirmative Action Plan will be to provide women the maximum possible opportunity to obtain equitable employment and career progression in the Agency's professional, technical and skilled job classifications *where women have not been traditionally employed and where they are presently underrepresented.* [J.A. 34; emphasis added].

See also id. at 51. No more is required to establish a proper predicate for some proper form of affirmative action under Title VII.

II. THE MEANS USED TO ACHIEVE AFFIRMATIVE ACTION

Title VII limits not only the ends which may be pursued through affirmative action, but also the means chosen to pursue such ends. *Weber* states two such limits: an affirmative action plan must not "unnecessarily trammel the interests of [nonminority] employees" and it must be a "temporary measure." 443 U.S. at 208.[10] Petitioner,

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[10] It is not entirely clear whether "temporariness" is an independent requirement for an affirmative action plan under *Weber*, or whether the Court's reference to the fact that the Kaiser plan was "temporary" was simply another way of stating that Kaiser was *not* seeking to *maintain* racial balance. If the latter is the correct reading of *Weber*, then the application of the affirmative action plan in this case to redress a gross imbalance would be lawful without regard to Respondent Santa Clara County's intent on how the County would proceed once the imbalance was redressed.

supported by the Solicitor General, suggests that the plan agreed to by the County's Transportation Agency and the Union runs afoul of both of these principles; as we proceed to show, the supporting arguments advanced cannot withstand analysis.

A. The "Trammeling" Issue

(1) In explaining its conclusion that the affirmative action plan in *Weber* did not "unnecessarily trammel the interests of the white employees," the Court stated:

> The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. [443 U.S. at 208].

Precisely the same is true here.

The affirmative action plan here does not compel the discharge or layoff of any nonminority employee; indeed the plan expressly recognizes that it will be "difficult to attain the Agency's employment goals," because, *inter alia*, the employee "turnover rate . . . is very low, greatly *limiting the opportunities available to hire minorities* [*and*] *women* . . . in the job classifications where they are most under represented." J.A. 55-56 (emphasis added). Nor does the plan "create an absolute bar to the advancement of nonminority employees"; the plan does not set aside any positions for minorities or females and the plan expressly provides that any annual goals that are established "should not be construed as 'quotas' that must be met" but rather are to "be seen as realistic desired levels of achievement." J.A. 64.

Indeed, in this regard, the instant case is a far easier one than *Weber*. Kaiser's affirmative action plan was far more rigid and had a far greater adverse " 'effect . . . upon innocent third parties,' " *Sheet Metal Workers*, 54 L.W. at 5001 (Powell, J., concurring), than does the plan in the instant case. Under Kaiser's plan, a quota was established: nonminorities could not compete for 50% of all apprenticeship vacancies.[11] In contrast, the

affirmative action plan here, like the Harvard admissions plan discussed in *Bakke*, provides that gender "may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available [vacancy]." 438 U.S. at 317 (opinion of Powell, J.). While gender, like any other factor, may be determinative in a particular case, that will occur only where, as was true here, management concludes that the alternative candidates for a job are both competent and possess comparable qualifications.

There is a further, and related respect, in which the affirmative action plan at issue here has a less pronounced impact on nonminorities than the plan at issue in *Weber*. Under the prevailing personnel practices, in filling vacancies, management is free to choose whichever of the seven top-ranked applicants management decides will best further the County Transportation Agency's mission. Accordingly, no employee has any entitlement, or any expectation based upon law or contract, to a particular opening. *Cf.*, *Bishop v. Wood*, 426 U.S. 341 (1976). Thus, considering gender as a "plus" factor in making employment decisions cannot "disrupt . . . settled seniority expectations." *Wygant*, 54 L.W. at 4483 (plurality opinion). In contrast, in *Weber*, the affirmative action plan was superimposed upon a seniority-based selection process, albeit with respect to a newly-created apprenticeship program, and therefore the Kaiser plan was more disruptive of security-based expectations.

(2) In arguing to the contrary, Petitioner and the Solicitor General stress two points: the "burden" of the affirmative action plan in this instance, it is said, is focused on one individual, Petitioner Johnson, *see* Pet.

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[11] Petitioner here is wrong in suggesting that in *Weber*, nonminorities were guaranteed 50% of all apprenticeships. *See* Pet. Br. at 43. The Kaiser affirmative action plan provided that *"not less than"* 50% of apprenticeships would go to minorities, and required the application of seniority principles except where necessary to meet the 50% ratio.

Br. at 33-34, Br. for U.S. at 28-29; and, it is added, Petitioner has been denied a promotion rather than an entry-level job, *see* Pet. App. Br. 36; Br. for U.S. at 28-29. Neither point serves to distinguish *Weber* and neither provides a sound basis in principle to overturn the affirmative action plan in this case.

(a) Although management was legally free to select any of the top seven applicants for the road dispatcher job, it is reasonably clear that Petitioner and Diane Joyce, the successful (female) applicant, were the two finalists, and that the job would have gone to Petitioner had it not gone to Ms. Joyce. But whenever an affirmative action program is applied to a particular opening that is being filled through a selection process that compares the qualifications of applicants—be it an entry-level position for which persons off-the-street have applied or an opportunity for advancement which incumbent employees are seeking—the selection of a black or female pursuant to that program will necessarily disadvantage the identifiable nonminority applicant who otherwise would have been selected. That was true in *Weber*, itself; Brian Weber lost out on an apprenticeship position to a black with less seniority than Weber. Yet the *Weber* Court did not view that fact as one that invalidated the affirmative action plan there.

Indeed, the only way to completely avoid disadvantaging identifiable individuals in the pursuit of affirmative action would be to create rigid quota systems in which certain positions are reserved for blacks or women and for which no others may apply. Such an approach would, of course, assure that affirmative action has an equal adverse effect on all nonminority applicants as a group rather than an effect felt by one of those applicants in particular. But it would be most ironic if the rule against "unnecessarily trammeling the interests" of nonminorities were to require employers who desire to adopt an affirmative action plan to provide for a rigid quota system thereby precluding the adoption of plans

providing that race or gender is a "plus factor" in a decision-making process in which nonminority applicants are not foreclosed from consideration for any available position.

This is not to deny the relevance of the "diffuseness of the burden impose[d] on innocent nonminorities," *Sheet Metal Workers*, 54 L.W. at 5002 n.3 (Powell, J., concurring), in assessing the lawfulness under Title VII of a particular affirmative action plan. Our point is rather that the "diffuseness" inquiry cannot end with a determination that in the end the affirmative action disadvantages an identifiable individual, lest employers be pushed into adopting needlessly rigid plans.

In this regard we note that what sets apart the plan struck down in *Wygant* (on Fourteenth Amendment grounds) from the plan at issue here is not that identifiable nonminorities were adversely affected but the nature of that effect. Notwithstanding their seniority rights, these nonminorities were subject to the *indefinite loss of their jobs*. The *Wygant* plurality explained:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. *Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job* [54 L.W. at 4484; emphasis added].

The *Wygant* plurality also noted that " 'the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker "owns," ' " and therefore "[*l*]*ayoffs disrupt these settled expectations in a way that general hiring goals do not.*" *Id.* (emphasis added). The plurality concluded:

> While hiring goals impose a diffuse burden, often foreclosing any one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious

> disruption of their lives. That burden is too intrusive. [*Id.*]

Thus in concluding in *Wygant* that the "burden" placed on "particular individuals" by layoff quotas is "too intrusive," the plurality placed great weight on the "kind of injury that layoffs"—as distinguished from non-hiring decisions—impose. And while we do not doubt that the lesson taught by *Wygant* with regard to the type of affirmative action plans that are permissible under the Constitution applies as well to Title VII—Justice Powell's opinion in *Sheet Metal Workers* makes that much clear—that lesson is not implicated here for the reasons previously explained.

(b) The County Transportation Agency-Union affirmative action plan likewise cannot be struck down here on the ground that the injury Petitioner suffered related to a promotional opportunity rather than an entry-level position. That was equally true in *Weber*, as that case involved apprenticeship positions which were to be filled from among those already working for Kaiser.

Moreover, it would be anomalous in the extreme to hold that an employer may engage in affirmative action in order to fill *entry-level* positions—positions which are typically the lowest paid, least desirable jobs in a workplace—but that thereafter affirmative action must end. Such a rule would fail to further one of *Weber's* critical aims: "to break down old patterns of racial segregation *and hierarchy*." 443 U.S. at 208 (emphasis added). And such a rule would delay, rather than hasten, the day when "no [employment] decision will be based upon immutable characteristics." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). Nothing recommends such a rule and nothing in this Court's precedents lends any support to such a rule.

(3) Petitioner, again supported by the Solicitor General, advances a further, broader critique of the affirmative action plan at issue here. Proceeding from the prem-

ise that a voluntary affirmative action plan is invalid under Title VII if the plan is not, in a court's view, "narrowly tailored to achieve its remedial objectives while at the same time intruding to the least extent practicable upon the expectations and interests of innocent third parties," Br. for U.S. at 17, Petitioner and the Solicitor General attack the plan here as overbroad in various of its particulars. *See* Pet. Br. at 38-42; Br. for U.S. at 25-26 & ns.14-17. This line of analysis is doubly flawed.

First, the premise of the analysis is unsound. *Weber* does not adopt any variant of the least-drastic-means approach that Petitioner champions. Indeed, it is doubtful that the *Weber* plan could have survived such an analysis. Who is to say that the 50% quota involved in *Weber* was necessary to "achieve its remedial objectives"? Surely, a lower quota—with a lesser impact on nonminorities—might in some sense have sufficed. Indeed, Kaiser arguably did enough by creating an apprenticeship program in lieu of hiring only already-trained craftsmen; if, as the lower courts in *Weber* had found, Kaiser had never discriminated in hiring, Kaiser could have filled its apprenticeships on a pure seniority basis and still eventually train a significant number of black craftsmen. Yet the *Weber* Court did not even discuss whether an apprenticeship program filled by seniority would have been "adequate" to achieve Kaiser's aims.

The reason that *Weber* did not engage in such analysis is plain from the opinion. The *Weber* Court relied in substantial measure on Congress' intent in enacting Title VII that " 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.' " *See* p. 9 *supra*. The rule that an affirmative action plan may not "unnecessarily trammel the interests" of nonminorities states an *outer* limit to a broad managerial discretion and is not intended to provide the basis for close judicial oversight of all details of the plan. Petitioner and the Solicitor General thus miss an essential

lesson of *Weber*. *Cf. Fullilove*, 448 U.S. at 508 (Powell, J., concurring) ("this Court has not required remedial plans to be limited to the least restrictive means of implementation").

Second, even assuming *arguendo* the validity of the type of analysis upon which Petitioner and the Solicitor General embark, both misconstrue the affirmative action plan at issue here. Reduced to its essentials, what that plan does is: first, adopt a "long-range goal" of attain[ing] a work force which includes in all occupational fields and at all employment levels, minorities, women, and handicapped persons in numbers consistent with the ratio of these groups in the area work force," J.A. 54, 31; second, provide for annual workforce analyses to ascertain where the County Transportation Agency stands in relation to the goal, *see* J.A. 61-64; and third, to the extent the long-term goal has not been met, establish "yearly employment goals for women, minorities and handicapped persons in each EEOC job category and major job classification" in which there is significant underrepresentation. J.A. 64.

The long-term goal the plan adopts is identical to the goal Kaiser adopted in *Weber* with respect to craft positions. The annual workforce review that is performed to determine whether there has been progress toward the goal is in keeping with the fundamental spirit of Title VII which is intended to act as a "spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices." *Weber*, 443 U.S. at 204, *quoting Albemarle Paper Co. v. Moody*, *supra*, 442 U.S. at 418. And finally, the adoption of annual goals and the concomitant consideration of race or gender as a "plus" factor where underrepresentation persists, is, as we already have seen, a modest form of affirmative action of the type *Weber* permits.

Thus, the attempts by Petitioner and the United States to portray the affirmative action plan as heavyhanded and excessive simply do not withstand analysis.

B. The "Temporariness" Issue

(1) In *Weber* the collective bargaining agreement between Kaiser and the Steelworkers provided for continuing affirmative action "until the goal [of proportional representation] is reached." P. 7 *supra*. The agreement did not state what would happen after that point or whether the goal would be deemed a continuing one, authorizing affirmative action should minority representation fall below "the goal." [12] Nonetheless, given the terms of the agreement, the Court assumed its temporariness:

> [T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftsworkers in the Gramercy plant approximates the percentage of blacks in the local labor force. [443 U.S. at 208-09]

Cf., also, Fullilove, 448 U.S. at 513 (Powell, J., concurring) (minority set-aside temporary because the authorization measure of which the set-aside was a part was time-limited and thus "[i]t will be necessary for Congress to reexamine the need for a race-conscious remedy before it extends or reenacts (the set-aside])".

(2) The affirmative action plan in the instant case is temporary in precisely the same way as was the plan at issue in *Weber*. Although the plan here does not, in terms, contain a terminal date, it is framed in terms of achieving certain goals rather than maintaining fixed percentages. As the court below stated, "[i]mplicit in the plan

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[12] Kaiser's industrial Relations Manager at Gramercy testified that affirmative action would continue to assure that the goal continued to be met, *see* J.A. 69 in No. 78-432, but he was not a participant in the collective bargaining negotiations that had produced the affirmative action program, *id.* 64-66, 83-84, and before this Court the Steelworkers represented that it was that Union's understanding that the plan was temporary, Steelworkers Reply Br. in No. 78-432 at 5 & n.4.

is the intent to stop taking sex into account once the long-range percentage goals are attained." 748 F.2d at 1313. And the absence of an express termination provision is not fatal for the validity of an affirmative action plan should not "depend on technicalities in drafting." *Id.* at 1312.

The foregoing conclusion is buttressed by the general rule of construction, developed in contract cases but equally applicable here, that "ambiguously worded contracts should not be interpreted to render them illegal and unenforceable when the wording lends itself to a logically acceptable construction that renders them legal and enforceable." *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Absent something in the affirmative action plan that precludes reading the plan as time-limited, such an intent should be implied so that the lawfulness of the plan is preserved.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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